



## AMERICAN BAIL COALITION

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### **Bail Reform in California—Key Points and Summary of Collected Research Regarding the Proposed Shift to the “No Money” System**

Link to dropbox materials: [https://www.dropbox.com/sh/82w51xtnikpxhnq/AAB2QX1M-ajTUz\\_5AbIfaByea?dl=0](https://www.dropbox.com/sh/82w51xtnikpxhnq/AAB2QX1M-ajTUz_5AbIfaByea?dl=0)

*The “No-Money” Bail System is The Current Fad—States Cannot Afford It, and It May be Harmful to Defendants*

--Eliminating all monetary bail means moving to the federal system or the Washington, D.C. system. Preventative detention serves as the only basis for detention. This is a key decision-point.

--Many of the reformed jurisdictions, like Kentucky, still widely use monetary conditions of bail—they simply do not have licensed commercial bail bonding agents in their state and require instead defendants to post cash.<sup>1</sup> The no-money bail movement would cause a dramatic shift in Kentucky’s system if it were to be implemented there.

--The no-monetary bail system involves two options: preventative detention (which serves as the only means to keep someone in the custody of the state) and release on recognizance with or without supervision by the state.<sup>2</sup> Preventative detention must cover all crimes where a person could be held in jail preventatively, which is a much larger list than the current homicide crimes and the two other specific exceptions.<sup>3</sup> Thus,

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<sup>1</sup> Kentucky has recently gone from a majority of defendants on a monetary bail condition to about 1/3 of all defendants being released on a monetary bail condition.

<sup>2</sup> See constitutional provisions from New Jersey

[https://ballotpedia.org/New\\_Jersey\\_Pretrial\\_Detention\\_Amendment,\\_Public\\_Question\\_No.\\_1\\_\(2014\)](https://ballotpedia.org/New_Jersey_Pretrial_Detention_Amendment,_Public_Question_No._1_(2014)), New Mexico (proposed)

[https://ballotpedia.org/New\\_Mexico\\_Changes\\_in\\_Regulations\\_Governing\\_Bail,\\_Constitutional\\_Amendment\\_1\\_\(2016\)](https://ballotpedia.org/New_Mexico_Changes_in_Regulations_Governing_Bail,_Constitutional_Amendment_1_(2016)) and Report from Arizona Judicial Council re: proposed constitutional changes to implement the no-money bail system, recommendation #45 <http://www.azcourts.gov/LinkClick.aspx?fileticket=bmECOPU-FD8%3d&portalid=74>.

<sup>3</sup> Article I, Section 12 of the California Constitution:

“A person shall be released on bail by sufficient sureties, except for:

(a) Capital crimes when the facts are evident or the presumption great;

(b) Felony offenses involving acts of violence on another person, or felony sexual assault offenses on another person, when the facts are evident or the presumption great and the court finds based upon clear and convincing evidence that there is a substantial likelihood the person's release would result in great bodily harm to others; or

(c) Felony offenses when the facts are evident or the presumption great and the court finds based on clear and convincing evidence that the person has threatened another with great bodily harm and that there is a substantial likelihood that the person would carry out the threat if released.

Excessive bail may not be required. In fixing the amount of bail, the court shall take into consideration the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case.

A person may be released on his or her own recognizance in the court's discretion”



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the California Constitution would have to be changed to implement the no-money bail system.

--Criminal defense lawyers and the ACLU fought vigorously against the expansion of preventative detention leading up to the federal bail reform act of 1984 due to the potential increase in incarceration of defendants who would be detained with no bail.<sup>4</sup> The no-money bail movement points to the federal system as a model which, at the time, the District of Columbia system was sold as a model for the entire federal system to adopt.

--In fact, in the federal system, 64% of all arrestees are preventatively detained.<sup>5</sup> The Federal Bail Reform Act of 1984, which eliminated bail schedules and moved to a risk based system, increased pretrial detention by 267% between 1983 and 2010 measured by those who never get out of jail pending trial. The numbers also show the percentage of those who spend some time in jail has not changed, and that the population of those who were previously not jailed is the population that is being detained at increasing rates. In Washington, D.C. that number is only 15-20% detained the entire period between arrest and disposition; however, it is higher than other states including New York, which was only at 9.7%. Recent data from Connecticut indicated that only 7.46% of defendants were incarcerated the entire period. The move to this no-money, risk-based bail system may prove to increase incarceration.

--In addition, the Riverside Federal Public Defender recently questioned the consistency of the federal system, calling it the “do as I say, not as I do” Justice Department, criticizing the Department for trying to reform local bail systems while presiding over a broken federal bail system. This article notes that the Federal system is widely inconsistent in its use of preventative detention, indicating the extreme potential for abuses in that system.<sup>6</sup>

--Costs of this move are high—D.C. expects costs of \$61 million annually, and New Jersey is trying it, with expected net economic costs of \$500 at full implementation.<sup>7</sup> The counties are continuing to call for delays due to lack of resources and New Jersey Governor Chris Christie has called on the Attorney General to do a new cost estimate.<sup>8</sup>

--The New Mexico Legislature rejected the bail/no-bail system and instead adopted a compromise that provided for expanded preventative detention and expedited bail review hearings on a 69-0 vote. The key is that the right to be free from being jailed “solely due

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<sup>4</sup> <https://library.cqpress.com/cqalmanac/document.php?id=cqal81-1173164>

<sup>5</sup> See <https://www.bjs.gov/content/pub/pdf/pdmfcdc9510.pdf>

<sup>6</sup> See enclosed article.

<sup>7</sup> See studies from Towson University in materials.

<sup>8</sup> See enclosed economic impact studies and other collected materials on the costs of bail reform in New Jersey.



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to inability to pay” was limited in the sense that it was not self-executing, i.e., a motion must be filed and the defendant must show that he or she was being held solely due to inability to afford the bail and that he or she is not a danger to the community or a flight risk. This example represents sensible compromise on both ends of the spectrum that still preserves judicial discretion to set bail in all cases in the middle, and in particular where there are flight risks or risks to public safety that warrant high bail when the prosecutor either cannot or does not prove a case by clear and convincing evidence.

--Most defendants cannot afford the cost of supervision which, in many jurisdictions, is more than a significant bail bond. This sets them up to fail on supervision by expansive electronic monitoring.<sup>9</sup>

### *Monetary Bail Conditions are Constitutional Contrary Claims by Legal Activists Having Filed a Litany of Copy-Cat Lawsuits*

--Despite the widespread allegations of the unconstitutionality of bail by trying to couch bail as a debtors’ prison issue, none of the alleged cases holding that someone who cannot “afford” bail has their right to equal protection violated have been decided by a U.S. Court of Appeals. One case, *Walker v. Calhoun*, has gained a dispositive, positive ruling by a U.S. District Judge, which is pending on appeal before the U.S. Court of Appeals for the 11<sup>th</sup> Circuit.

--In a brief filed by former U.S. Solicitor General Paul Clement, he makes it undoubtedly clear that monetary conditions of bail are constitutional.<sup>10</sup> The brief also explores the constitutional boundaries of bail which may assist in policy-making and understanding in this area. Other briefs were filed in support of the constitutionality of bail from other *amici* including the Georgia Sheriffs Association, the International Municipal Lawyers Association, the Georgia Municipal Association, and the Alabama Municipal Association.

--On October 11, 2016 (order in materials), in the case *Welchen v. Kamala Harris.*, U.S. District Judge Troy Nunley dismissed the equal protection bail claim that underlies this entire movement.

--Chief Judge Craig DeArmond of Illinois issued a lengthy position paper against moving to the no-money bail system in September, 2016, which is included in the materials.

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<sup>9</sup> See the article, Chain Gang 2.0 article regarding Antonio Green. <http://www.ibtimes.com/chain-gang-20-if-you-cant-afford-gps-ankle-bracelet-you-get-thrown-jail-2065283> Also, note that there are lawsuits in several jurisdictions challenging the constitutionality of re-jailing people who cannot afford their pretrial supervision.

<sup>10</sup> See attached *amicus* briefs filed in *Walker v. Calhoun Georgia*, as case pending in the U.S Court of Appeals for the 11<sup>th</sup> Circuit. All of the briefs filed in the case are here: <https://www.dropbox.com/sh/z2ew0fa4u8mc4ck/AAB4ezJQgg8sZ6gz9TScQcbsa?dl=0>



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### *Bail Reform Becomes Clearer When We Reject the Bail-No-Bail Mentality and Focus on the Systemic Problems in a Particular Bail System at the State or Local Level*

--The art of bail is sorting people into the right categories, which minimizes the risk of flight and risk to the community in light of community conditions and resources.

Periodical adjustments are always necessary. No system is perfect.

--The appropriate use of monetary conditions of bail is evidence-based, and the effectiveness of it is supported by peer-reviewed academic research.<sup>11</sup> Yet, it is only one of the means of release, and should not be unnecessarily over-used.

--Non-monetary holds have a greater impact than an unposted security in keeping people in jail. In one study of the Los Angeles County Jail, 88% of defendants for whom a bail had been set in a case had some other administrative or legal hold that preventing them from bailing out of jail.<sup>12</sup> Do all of these holds make sense? Kaleif Browder, for example, was on a probation hold. Some analysis of these holds should be conducted—if a low-level probationer on a low-level new crime is held without bail, does that make sense? Should that person be bailable pending disposition of probation violation and new crime?

--Due process reforms may be preferred—are the procedures adequate under California and federal law so that defendants may properly and quickly assert their right to be free from excessive bail in front of a judge? Most due process issues have occurred at the local level. California must consider if the time for a bail review, while constitutional, is too long from a policy perspective. The trend is moving toward that of the Clanton, Alabama settlement (48 hour *de novo* review of bail set by a schedule.)

--Pre-arrest or pre-detention evaluation—avoid arresting people who will get a recognizance release.

--Administrative reforms—the time from arrest to bail out typically can be shortened.

--Fugitive Recovery issues—national survey highlights problems in state and local processes when dealing with the return of fugitives who have been located and apprehended in foreign jurisdictions.<sup>13</sup>

--Effectiveness of supervision and sorting appropriate persons to supervision.<sup>14</sup>

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<sup>11</sup> See enclosed collected articles and report from Santa Clara County Board of Supervisors Working Group.

<sup>12</sup> See enclosed study of the Los Angeles County jail by the ACLU of Central California.

<sup>13</sup> See enclosed survey.

<sup>14</sup> In two touted programs, Washington, D.C. and Mesa County, Colorado, the new crime rates while on supervision were 29.7 and 20 percent respectively. See enclosed reports.



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- Benefit-cost analysis of the system in light of cost of failure to appear, impact on communities and victims, etc.<sup>15</sup>
- Making sure that defendants have adequate counsel so that they can assert their Eighth Amendment rights.
- Speedy-trial reforms reduce pretrial incarceration for all categories of defendants, whether preventatively detained, held on a non-monetary hold, or held in lieu of posting a financial bail and allow victims and the community to get justice more quickly.
- Finding solutions through industry-partnerships to provide access to bail, which is the least restrictive form of release other than recognizance, when it can be provided to a defendant.<sup>16</sup>
- Consideration of recommendations made in the Little Hoover Commission report and other reforms including transparency and process surrounding the setting of the bond schedules and issues with bond schedules being too high.

### *Is the Move to Predictive Algorithms to Replace or Inform Judicial Decisions Appropriate?*

- Recently predictive algorithms (risk assessments) are coming under increasing scrutiny as they are failing to be predictive and have had a negative impact on protected classes potentially running afoul with the federal constitution.<sup>17</sup> Former Attorney General Eric Holder has also questioned the use of demographic factors in risk-based instruments.<sup>18</sup>
- San Francisco Public Defender Jeff Adachi recently criticized the Arnold Foundation PSA Risk Assessment tool, suggesting that it has negative racial implications and incarcerates more people.<sup>19</sup>
- Can the algorithms co-exist with consideration of constitutional factors, statutory factors and other information?
- If we move to a no-money bail system, will the algorithms combined with judicial discretion hurt protected classes more than if they had access to monetary bail as an alternative to preventative detention?

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<sup>15</sup> The Robert Morris study in the materials is one example of this.

<sup>16</sup> The vast majority of defendants are provided a bail bond by a third-party. It may be that some portion of defendants could be release-able, and thus the least restrictive form of release would be to provide a person access to a commercial surety rather than force them into intrusive supervision by the state.

<sup>17</sup> See collected articles enclosed. This study has been widely cited: <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing> This link has a list of over a dozen academic articles discussing the use of big data in criminal justice and the potential problems: <https://epic.org/algorithmic-transparency/crim-justice/>

<sup>18</sup> <http://time.com/3061893/holder-to-oppose-data-driven-sentencing/>

<sup>19</sup> See article from Jeff Adachi in materials.



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--Need for appropriate safeguards—the National Association of Legal Defenders issued a recent report detailing the significant issues with the use of risk assessments that require consideration and necessary safeguards.<sup>20</sup> Also, a recent Wisconsin Supreme Court decision, while in sentencing context, discusses the necessary legal safeguards surrounding the use of big-data predictive algorithms.<sup>21</sup> These issues in the pretrial context have not been well-studied. For example, the Wisconsin Supreme Court indicated that the algorithms cannot make a recommendation as to custody, but that is widely the case in the pretrial context.

--Delaware's risk assessment was determined to be invalid.<sup>22</sup>

### *We Are Here As Resource*

--Thank you for your time—we are always happy to provide any further information or assist you as you think about bail and bail reform.

### *Contacts for Further Information*

Jeffrey J. Clayton, Executive Director, American Bail Coalition, 303-885-5872,  
[jclayton@americanbail.org](mailto:jclayton@americanbail.org)

Katherine Brandenburg, Brownstein, Hyatt, Farber and Shreck, (916) 594-9700,  
[kbrandenburg@bhfs.com](mailto:kbrandenburg@bhfs.com)

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<sup>20</sup> See report in collected materials.

<sup>21</sup> <https://www.wicourts.gov/sc/opinion/DisplayDocument.pdf?content=pdf&seqNo=171690>

<sup>22</sup> See report in materials.